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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MEHDI ALEM et al., as Trustees, etc.,

Plaintiffs and Appellants,

v.

ROBERT OWENS et al.,

Defendants and Respondents.

G051441

(Super. Ct. No. 30-2011-00451590)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,

Steven L. Perk and Robert J. Moss, Judges. Affirmed.

Siobhan M. Bishop for Plaintiffs and Appellants.

Hart | King, William R. Hart, Andrew C. Kienle and Rhonda H. Mehlman  
for Defendants and Respondents.

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## INTRODUCTION

Mehdi Alem and Simi Morshedizadeh, as trustees of the Mehdi Alem and Simi Morshedizadeh 2002 Trust dated June 18, 2002 (plaintiffs), appeal from the judgment entered in favor of defendants Robert Owens and Kathleen Owens (the Owens defendants) after a bench trial of plaintiffs' claims for breach of contract, negligent failure to disclose, and fraud. Plaintiffs contend the trial court erred by concluding the Owens defendants were not required to disclose certain issues at the Laguna Niguel house that they sold to plaintiffs because those issues did not rise to the level of material defects. Plaintiffs further contend the court also incorrectly concluded that the Owens defendants were unaware of serious water intrusion problems at the residence and thus were not required to disclose them. Plaintiffs also contend the trial court erred by granting the Owens defendants' motion for summary adjudication as to plaintiffs' negligent construction claim.

We affirm. Substantial evidence supported the trial court's findings that the problems, which plaintiffs experienced with a shower drain odor, a sliding door lock, and the ponding of water on the front steps after a rain or watering, were minor and did not rise to the level of material defects, which would trigger a duty of disclosure on the Owens defendants. As for the other water intrusion issues discovered by plaintiffs, substantial evidence showed the Owens defendants did not experience, and were not otherwise aware of, those problems and thus were not required to disclose them. Finally, as no triable issue of material fact exists showing that the Owens defendants were involved in construction activities, summary adjudication of plaintiffs' negligent construction claim was properly granted.

## FACTS<sup>1</sup>

The Owens defendants purchased a lot located on Misty Sea Drive in Laguna Niguel, upon which Halton Corporation (Halton) designed and built a house (the property) for them. In April 2005, the Owens defendants moved into the property and lived there until April 2009, when they sold it to plaintiffs for \$2,942,500. At the time of the sale, the Owens defendants disclosed no defects in the property to plaintiffs.

Shortly after plaintiffs moved into the property, they noticed two “relatively minor problems.” First, they smelled a foul odor emanating from one of the master bathroom showers. Second, they had difficulty locking a set of sliding doors leading to a veranda. Later, plaintiffs discovered a third “relatively minor issue” when they observed that water tended to pond on the top three steps of the front entrance stairway after a rain or after watering potted plants on the front porch.

Plaintiffs contacted the Owens defendants about the foul odor in the shower. The Owens defendants told plaintiffs that they had encountered the same problem and had been informed by Todd Halton that the plumbing had been done correctly.<sup>2</sup> He had explained to the Owens defendants that such an odor occurs when a shower is not used very often and water in the trap dissipates, causing sewer gases to be noticeable in the bathroom. He had instructed the Owens defendants to put water down the drain every month or so if the shower was not used. Plaintiffs adopted that practice and the foul odor problem disappeared.

The evidence was unclear whether plaintiffs asked the Owens defendants about either the sliding door locking issue or the ponding of water on the front steps

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<sup>1</sup> This summary of the facts is based on the summary of the evidence set forth in the trial court’s statement of decision.

<sup>2</sup> Todd Halton is a licensed general contractor whose company, Halton, built the house at the property for the Owens defendants.

issue. The Owens defendants had experienced a similar problem with the sliding door lock. The door manufacturer had adjusted the locking mechanism, which seemed to fix the problem.

As to the issue of water ponding on the front steps, Robert Owens<sup>3</sup> testified that after a rain, he would routinely sweep any water off the steps and he considered that action to be a maintenance issue rather than a defect at the property.

In January 2010, after an unusually heavy rainstorm, plaintiffs noticed water dripping in the master bedroom. After another heavy rainstorm in February, more leaking occurred. Plaintiffs suspected the sliding door with the lock problem had been improperly installed, causing more water to leak into the master bedroom.

Plaintiffs contacted the Owens defendants, who got them in contact with Todd who inspected the property. Todd found a rooftop drain pipe that passed over the master bedroom had been cut by the electrician during the original construction process, leaving a hole in that pipe.

As Todd worked to repair the leak problem, it was discovered that a major structural beam in the master bedroom ceiling had been damaged by the leaking water and mold had grown in the wall cavity and under the baseboards. Todd's repair efforts included installing a steel beam to reinforce the damaged structural beam, replacing the drain pipe, and remediating the mold problem.

It was further discovered that the problem with the sliding doors was not a "maladjusted locking mechanism." The damaged structural beam had caused the sliding doors to become improperly aligned. The manner in which the sliding doors were installed was not changed.

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<sup>3</sup> We refer to Robert Owens and Kathleen Owens, as individuals, and Todd Halton by their first names for the purpose of clarity; we intend no disrespect.

Todd did not charge plaintiffs for any of the repair work at the property. Plaintiffs reported no further leaks in the master bedroom since the repair work had been done.

About the same time the master bedroom leak was discovered, plaintiffs found a leak under the window in the “second bedroom.” Todd testified that before the Owens defendants moved into the property, at a time when there was no carpeting on the floor, a puddle of water was observed on the floor under that window. Todd “water tested” the window and had the window’s manufacturer fix it. The Owens defendants did not have a problem with the second bedroom window leaking during the time they occupied the property. The Owens defendants did not consider the water observed under the window as evidence of a defect because it was fixed before they moved in.

Plaintiffs’ expert witness concluded that the window-flashing had not been installed correctly and needed to be repaired.

## PROCEDURAL HISTORY

### I.

#### THE FIRST AMENDED COMPLAINT

In May 2011, plaintiffs filed a first amended complaint containing claims for breach of contract, breach of express warranty, negligent failure to disclose, and fraud against the Owens defendants. The first amended complaint also contained a claim for negligent construction against the Owens defendants, Halton, and Hammon Electric, Inc.;<sup>4</sup> a claim for negligent repair against the construction defendants; a claim for fraud against Halton only; and a personal injury claim by Morshedizadeh against the Owens defendants and the construction defendants.

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<sup>4</sup> We refer collectively to Halton and Hammond Electric, Inc., as the construction defendants.

The first amended complaint alleged that in February 2009, the Owens defendants entered into a residential purchase agreement and joint escrow instructions with plaintiffs, in which the Owens defendants agreed to sell the property to plaintiffs. The first amended complaint alleged Halton had been the general contractor and Hammon Electric, Inc., was one of the many subcontractors hired by Halton for the construction and development of the property. The first amended complaint further alleged that since they had purchased the property, plaintiffs discovered the Owens defendants breached the residential purchase agreement and joint escrow instructions “by failing to deliver the [property] in the condition represented and failing to disclose numerous defects in the [property].” The first amended complaint stated the Owens defendants failed to disclose issues related to a history of water intrusion into the second bedroom and the consequent damages.

## II.

### THE OWENS DEFENDANTS MOVE FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION; THE TRIAL COURT GRANTS THE MOTION FOR SUMMARY ADJUDICATION AS TO THE NEGLIGENT CONSTRUCTION CLAIM ONLY.

The Owens defendants filed a motion for summary judgment or, in the alternative, for summary adjudication of the issues. The motion stated in part that it was made “on the grounds that there are no triable issues of material fact as to any of Plaintiffs’ causes of action against the Owens, such that the Owens are entitled to judgment as a matter of law since Plaintiffs have not and cannot prove the necessary elements for the imposition of liability on the Owens given they had no knowledge of any of the defects complained of by Plaintiffs at any time during their ownership of the Property, and therefore had no duty to disclose them.” The motion further stated, “[i]n the alternative, pursuant to Code of Civil Procedure section 437c(f), the Owens move the Court for an order adjudicating the following issues.”

As relevant to this appeal, the Owens defendants asserted that the cause of action for negligent construction had no merit because “there are no allegations or evidence that the Owens were involved in any aspect of the construction of the real property which is the subject of this lawsuit.” The trial court denied the motion for summary judgment, but granted summary adjudication on the negligent construction claim because “[n]o triable issues of fact have been created as to whether Owens performed any actual construction or performed any ‘design’ function on this house.” The trial court overruled all the parties’ evidentiary objections because they failed to conform to rule 3.1354 of the California Rules of Court. None of the court’s rulings on the evidentiary objections is at issue in this appeal.

### III.

PLAINTIFFS SETTLE WITH THE CONSTRUCTION DEFENDANTS; THE TRIAL COURT CONDUCTS A BENCH TRIAL OF THE REMAINING CLAIMS AGAINST THE OWENS DEFENDANTS, ISSUES A STATEMENT OF DECISION, AND ENTERS JUDGMENT IN FAVOR OF THE OWENS DEFENDANTS; PLAINTIFFS APPEAL.

Before trial, plaintiffs reached court-approved settlements with the construction defendants. Plaintiffs’ counsel confirmed, at the beginning of trial, that Morshedizadeh’s personal injury claim was not a separate cause of action, but an element of alleged damage relating to the other causes of action. Therefore, only plaintiffs’ claims for breach of contract, negligent failure to disclose, and fraud against the Owens defendants were tried to the bench.<sup>5</sup>

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<sup>5</sup> During opening statements, plaintiffs’ counsel stated, “[t]here are several different causes of action pled. There’s breach of contract, there’s fraudulent and negligent non-disclosure, and there’s—those are the three main causes of action. [¶] There’s two other causes of action that are alleged in the complaint. One is for breach of warranty. I don’t think we’re going to be pursuing that. I don’t think that’s any different result than the breach of contract and the breach of warranty is really geared more towards product liability. [¶] There is a separate cause of action for personal injury, and that’s what it’s entitled in the complaint. That’s really a damage rather than a separate cause of action,

Following a seven-day trial, during which the court heard testimony from 21 witnesses and considered “numerous documentary exhibits,” the court ruled in favor of the Owens defendants as to all three causes of actions. The court’s statement of decision explained its findings and application of law, as follows:

“A seller of real estate owes a duty to the buyer to disclose defects known to the seller that may materially affect the value or desirability of the property. [Citations.] A seller does not guarantee that the property is without defects. Whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact. [Citation.]

“With respect to the three minor issues (odor from shower drain, sliding door lock, and front steps) Plaintiffs failed to meet their burden of proving that these items materially affected the value or desirability of the Subject Property. While issues to be dealt with, they appeared to be easily handled by routine maintenance steps. Thus, the Owens were not required to disclose these issues in connection with their sale of the Subject Property to Plaintiffs.

“As for the more serious water intrusion issues, Plaintiffs failed to meet their burden of proving that the Owens had actual knowledge of these issues at the time they sold the Subject Property. To begin, the Owens made credible witnesses and both testified they had no experience with water leaking in the master bedroom or the second bedroom after they moved into the Subject Property. The builder, Halton, also testified that the Owens never complained about leaks. He, too, made a credible witness.

“Secondly, if the Owens had experienced leaking problems, they simply would have reported them to Halton, who would have fixed them free of charge, just as he later did for Plaintiffs. Thus, there was no incentive for the Owens to remain silent and/or conceal any water leaking into their home.

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so even though it’s entitled a cause of action, it really fits into the other three causes of action.”



“Third, there was evidence through expert testimony that the rain storm that preceded the leaking in January and February of 2010 was unusually strong. There had been no rainfall of that intensity during the preceding 5 years. It is reasonable to conclude that the high volume of water in a short period of time caused the water to drip out into the interior of the home.

“While the defects (hole in drain pipe and configuration of sliding doors) certainly existed from the time of construction, these were latent defects that would not be apparent to lay homeowners unless there was some visible evidence such as dripping or staining. It was reasonable for the Owens to believe that the problem with the sliding doors not locking was an adjustment issue rather than a sagging structural beam. If water entered the walls during the time the Owens lived in the home, there was no evidence of outward manifestation, such as staining or dripping, that would be visible to a person living in the home. Finally, there was not testimony from other persons (neighbors, repair persons, prospective buyers, real estate agents, etc.) who witnessed leaking or evidence thereof during the time that the Owens lived in the Subject Property.

“For these reasons, the Court finds that the Owens did not breach the purchase and sale agreement relating to the Subject Property and did not negligently or intentionally fail to disclose any material defect in the Subject Property at the time of the sale. The Court need not address the issue of damages since Plaintiffs failed to prove that the Owens are liable to Plaintiffs under any theory tried to the Court.”

Judgment was entered in favor of the Owens defendants.<sup>6</sup> Plaintiffs appealed.

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<sup>6</sup> In the statement of decision, the trial court stated that the Owens defendants would be entitled to recover prevailing party attorney fees and costs. Our record does not show the resolution, if any, of plaintiffs’ motion to tax costs or the Owens defendants’ motion for attorney fees. Costs and attorney fees are not at issue in this appeal.

## DISCUSSION

### I.

#### THE TRIAL COURT’S FINDINGS FOLLOWING THE BENCH TRIAL WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Plaintiffs challenge the trial court’s finding that the Owens defendants were not required to disclose to plaintiffs the odor from the shower drain, the problem with the sliding door lock, or the water ponding on the front steps because those issues were minor and immaterial. Plaintiffs also challenge the court’s finding that plaintiffs “failed to prove [the Owens defendants] had knowledge of ‘the more serious water intrusion issues.’” We review the trial court’s express factual findings, and any implied findings, for substantial evidence. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 59; *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.)

### A.

#### *General Legal Principles Governing a Seller’s Duty to Disclose*

“A real estate seller has both a common law and statutory duty of disclosure. The court in *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 . . . , outlined the common law duty, explaining: ‘In the context of a real estate transaction, “[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property . . . and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]” [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.]’ A seller’s duty of disclosure is limited to material facts; once the essential facts are disclosed a seller is not under a duty to provide details that would merely serve

to elaborate on the disclosed facts. [Citation.] Where a seller fails to disclose a material fact, he may be subject to liability ‘for mere nondisclosure since his conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation].’ [Citation.] Generally, whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact. [Citations.]” (*Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161; see *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 [“Whether or not the seller has actual knowledge of an undisclosed fact is obviously a question of fact . . . . However, whether the matter which was not disclosed was of sufficient materiality to have affected the value or desirability of the property is also a question of fact [citations] . . . .”].)

## B.

*The Trial Court Did Not Err by Concluding the Issues Involving the Foul Odor Emanating from the Shower, the Sliding Door Locking Issue, and the Ponding of Water on the Front Steps Were Not Material Defects That the Owens Defendants Were Required to Disclose.*

Plaintiffs contend the trial court’s findings that the issues involving the foul odor from the shower drain, the sliding door that was difficult to lock, and the ponding of water on the front steps after a rain or watering were “minor” (capitalization & boldface omitted) and that plaintiffs did not meet their burden of showing that any of those issues materially affected the value or desirability of the property. Substantial evidence supported the court’s findings.

### 1.

*The shower drain odor*

Substantial evidence supported the trial court’s finding that the shower drain odor problem was “minor” and immaterial. Robert testified that after he and

Kathleen had lived at the property for about a year, they noticed a bad smell coming from the bathroom area. He called Todd who had a plumber go “to take a look.” The plumber confirmed there were not any cracks in the plumbing and concluded that “the water in the trap must be evaporating” because no one was using that shower. The Owens defendants were told to periodically pour water down the unused shower drain. The Owens defendants performed that task according to a monthly schedule and, thereafter, “it was never an issue.” The Owens defendants poured water down the unused shower’s drain “the first couple of times,” then had their weekly house cleaners take over that task. In the summer or early fall of 2005, when plaintiffs “experienced the sewer smells,” Robert explained to Alem that “he needed to put water in the drains of showers that weren’t being used.”

Kathleen similarly testified that the odors coming from showers “w[ere] resolved by the regular maintenance of pouring the water in the drain[s].” She further testified, “[i]f you use the shower or put water once a month, it wasn’t a problem, or every two months.”

Todd testified that the Owens defendants had expressed to him a concern about a sewer smell coming from a particular shower drain. He arranged for a plumber to investigate and the plumber concluded “[t]hat there was a shower area where they were not using the shower and the trap had dried out and thus allowing the smell to come into the house.” Todd further testified that the plumber recommended, “if they were not going to be using it to put some water in it from time to time.”

Alem testified that after he had followed Robert’s advice and poured water down the drain of the shower that his family did not use and from which a foul odor emanated, the sewer smells disappeared. Alem said he followed the routine of putting water down the drain every two to three weeks.

Other than to offer evidence that the odor emanating from the unused shower was truly foul, plaintiffs did not show that the foul smell, which they admitted

was easily eliminated, constituted a material defect affecting the value or desirability of the property.

2.

*The sliding door lock*

Robert and Kathleen each testified that the only issue they had with one set of sliding doors was the locking problem. As for the locking issue, sometimes the door was difficult to lock and then Robert would call the door manufacturer to adjust the door; that occurred two or three times. Robert kept the door manufacturer's contact information in his house maintenance file. When asked whether the people, who adjusted the sliding door lock, explained why the door periodically needed adjusting, Robert testified, "[n]ot really. I just watched what they were doing and they were turning some adjustment screws and things worked better."

In their reply brief, plaintiffs argue, "the undisputed evidence presented at trial established that the problems with the sliding glass doors were caused by defects in the slope of the veranda, among other things, and extensive repairs were necessary to fix those defects." But substantial evidence showed the Owens defendants were unaware the sliding door locking issue involved the defects in the veranda slope, or any other structural problem. They were not responsible for disclosing a minor problem that had been fixed; they had no information suggesting the locking issue was caused by a larger problem.

In their opening brief, citing to a particular page of the reporter's transcript, plaintiffs argue, "Respondent Robert further testified at trial that the problem was significant enough that Respondents stopped using those doors." Robert did not testify that he and Kathleen stopped using the sliding door because of the lock issue. Instead, he testified, "[w]e didn't use that door that often, so it would only become an issue when, for some reason, the cleaning people would open it when they were doing their work and my

wife was trying to get it closed and she couldn't get it closed, and then I would call them out to adjust it so that it would lock properly.”

Substantial evidence supported the finding that the Owens defendants were not required to disclose the sliding door lock issue.

3.

*The ponding of water on the front steps*

Robert testified, “[a]fter a rain there would be some puddles out on the steps, and I would sweep them off.” He testified he never complained to Todd that the steps retained water. Kathleen never noticed water on the steps, and she did not know that Robert swept the steps after it rained.

Alem testified that he thought the ponding of the water was related to irrigation. He reduced the amount the pots in front were watered. When asked if that solved the ponding of water issue, Alem testified, “[t]o be honest, at that time it . . . wasn't a big deal, so I saw that there are some changes and I didn't care.”

Alem testified he later made changes to the steps, by replacing them with stone, to make the steps “nicer.” Substantial evidence supported the finding that the ponding of water on the front steps did not constitute a material defect that the Owens defendants were required to disclose.

4.

*Substantial evidence supported the trial court's findings that the Owens defendants did not know about the water intrusion issues.*

In their opening brief, plaintiffs argue, “there is no substantial evidence to support the court's finding that [the Owens defendants] lacked knowledge of the ‘water intrusion issues.’” (Capitalization, boldface, & underscoring omitted.) Substantial evidence showed the Owens defendants did not experience any water intrusion problems

and were unaware of the existence of the source of the water intrusion issues experienced by plaintiffs.

Robert testified at trial, as follows:

“Q During your ownership of the property, were you ever aware of any issue with water intrusion into your master bedroom?

“A No.

“Q Did you ever see any cracking in the ceiling of the master bedroom?

“A No.

“Q During your ownership of the property, did you ever notice any musty or moldy smells anywhere in the home?

“A No.

“Q And aside from what you already stated with respect to a few of the drains having the odor that was handled with the water, did you have any other issues as far as foul or obnoxious smells in the home?

“A No.

“Q Now, assuming, just for argument’s sake, that while you lived in the home you had a water leak, what would you have done?

“A I would call Todd Halton and make him fix it.

“Q Would that have been the case with any problem that you had in the home?

“A Yes.”

Kathleen similarly testified that during the time she and Robert owned the property, she did not have knowledge of any water leaks in the master bedroom, never saw water stains anywhere in the house, and was not aware of any issue with the reverse slope on the veranda.

Robert also testified that before construction was finished, he had walked through the house to “see what was going on.” He looked in the second bedroom and

saw a small puddle of water on the floor near the window. It had rained the night before. He called Todd who did some testing. Todd told Robert that the window seal was broken and Todd had the window manufacturer come out and fix the problem. Robert testified that during “the whole four years that we lived there, we never noticed any moisture in the room.” Robert was not aware of any issues regarding the veranda sloping improperly. Kathleen similarly testified that after she and Robert moved into the property, she never experienced water leaks of any sort in the second bedroom.

Todd testified that neither Robert nor Kathleen complained to him regarding rain gutters, water intrusion, musty or moldy smells, or a reverse slope on the veranda deck. He did not see any staining on the walls or the ceilings after the Owens defendants had moved into the property.

Plaintiffs argue that with regard to the problem with the second bedroom window, the Owens defendants marked on the seller property questionnaire that there had been no defects, repaired in the past or otherwise, among other things, to windows at the property. They argue that Robert knew there had been a problem with water intrusion in that room, which had been repaired. Plaintiffs cite an exhibit to their first amended complaint, which was unverified. They do not cite to trial evidence in their appellate briefs. Assuming that document was properly admitted and authenticated at trial, it instructs the seller to disclose “known material or significant items affecting the value or desirability of the Property.” In other words, that document mirrors the same legal standard of disclosure, discussed *ante*. Substantial evidence showed the Owens defendants did not know of any material defect with regard to the window in the second bedroom. Robert was only aware of a broken window seal that was discovered during construction following a rainfall; substantial evidence showed neither Robert nor Kathleen had knowledge of any more significant water intrusion problems—material defects—at the property.



Plaintiffs disagree with the trial court's finding that the Owens defendants and Todd were credible witnesses. It is the province of the trier of fact, however, to make credibility determinations. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926 ["In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]. All issues of credibility are likewise within the province of the trier of fact."].) We review the record for substantial evidence to support the court's findings of fact.

Plaintiffs also argue, "the statement of decision issued by the court failed entirely to address Appellant Simi's claim based on her allergy to molds caused by the water intrusion [the Owens defendants] failed to disclose to [plaintiffs]." As referred to by plaintiffs' counsel during opening statements, the issue whether Morshedizadeh suffered allergies as a result of the mold caused by water intrusion is relevant to the issue of damages, not liability. As noted in the statement of decision, because the court did not find the Owens defendants liable, there was no need to address issues related to damages.

## II.

### THE TRIAL COURT DID NOT ERR BY GRANTING SUMMARY ADJUDICATION AS TO PLAINTIFFS' NEGLIGENT CONSTRUCTION CLAIM.

In their opening brief, plaintiffs argue that the Owens defendants were not entitled to summary adjudication of the negligent construction claim because "they failed to meet their initial burden of establishing the cause of action had no merit. Because [the Owens defendants] failed to meet their initial burden, the burden never shifted to [plaintiffs] to establish a triable issue of fact existed." For the reasons we will explain, summary adjudication was properly granted in favor of the Owens defendants on the negligent construction claim.

A.

*Applicable Standard of Review and Burdens of Proof*

“We review orders granting summary judgment or summary adjudication de novo. [Citations.] A motion for summary judgment or summary adjudication is properly granted if the moving papers establish there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.]” (*Mooney v. County of Orange* (2013) 212 Cal.App.4th 865, 872.) ““The moving party bears the burden of showing the court that the plaintiff “has not established, and cannot reasonably expect to establish, a prima facie case . . . .” [Citation.]’ [Citation.] ‘[O]nce a moving defendant has “shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,” the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff “may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .” [Citations.]’ [Citation.]” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.) We ““liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.”” (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.)

B.

*There Were No Triable Issues of Material Fact Regarding Whether the Owens Defendants Were Liable to Plaintiffs for Negligent Construction.*

The trial court granted the Owens defendants’ motion for summary adjudication as to the negligent construction claim because there was no triable issue as to whether the Owens defendants performed any actual construction or performed any design function at the property.

Although not expressly referenced in the portion of the separate statement addressing the negligent construction claim, the Owens defendants' separate statement asserted that the Owens defendants hired Halton to construct a new home on the property. In their response to the Owens defendants' separate statement, plaintiffs clarified that the Owens defendants hired Halton to both construct *and design* that home, citing Todd's deposition testimony.

Along with their reply brief in support of the motion, the Owens defendants submitted the following testimony from Robert's deposition:

"Q. Okay. [¶] So I understand in this—I understand that you had decided to build a custom home, which is the subject of this action. [¶] I think it's 2[XXXX] Misty Sea; is that correct?

"A. That is correct.

"Q. Okay. [¶] And is that home—was that the first home that you constructed as a builder?

"[The Owens defendants' counsel]: Objection, compound. Assumes facts.

"By [plaintiffs' counsel]:

"Q. You may answer.

"[The Owens defendants' counsel]: Vague.

"The Witness: I'm not a builder.

"By [plaintiffs' counsel]:

"Q. Okay.

"A. I hired a contractor to build the home.

"Q. And that contractor was Mr. Halton?

"A. Correct.

"Q. His company? [¶] Have you ever had a custom home built before for you?

“A. No.

“Q. So this was the first and only custom home you’ve ever had built for you?

“A. Correct.” (Some capitalization omitted.)

Plaintiffs did not object to the late submission of the above quoted deposition testimony in the trial court and do not argue on appeal that the trial court erred by considering it.

It has been held, “[t]his is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist.*” (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) However, a panel of this court, in *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315, rejected such an absolute prohibition against consideration of evidence not referenced in the separate statement. Instead, this court concluded that the language of Code of Civil Procedure section 437c, subdivision (b)(1) gives the trial court the discretion to consider evidence not referenced in the moving party’s separate statement; this court reviews that decision for abuse of discretion. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra*, at p. 316.)

Here, the trial court did not abuse its discretion by considering the above cited evidence in determining that the Owens defendants met their initial burden of showing that plaintiffs could not prove their liability for negligent construction. The evidence showed the Owens defendants did not themselves build at the property, but hired Halton to do so. Plaintiffs failed to cite or produce *any* evidence in opposition to the motion showing that either Robert or Kathleen was involved in construction activities, much less that he or she was negligent in any such involvement. To the contrary, in opposition to the motion, plaintiffs produced an excerpt of Todd’s deposition testimony stating that he acted as both the designer and builder for the property.

In a footnote in their appellants' reply brief, plaintiffs cite excerpts from the bench trial and argue they "did have evidence to establish [the Owens defendants] participated in the design and/or construction of the subject property. Specifically: [the Owens defendants] provided Halton with photographs of how they wanted the house designed; they changed Halton's original design, so the living area was upstairs and the bedrooms were downstairs; they requested that the veranda be the same height as the inside floor; and Robert went to the project three times a week to check on its progress, and had frequent meetings with Halton." Plaintiffs do not argue they presented any such evidence in opposition to the motion for summary adjudication. They did not ask for a continuance of the hearing on the motion to enable them to conduct further discovery.

The evidence cited in the appellants' reply brief consists of Robert's testimony that Todd suggested plaintiffs look through magazines and cut out pictures of homes they liked, to give Todd "a general idea of what we were looking for, and then [Todd] came up with a floor plan and design of the house." Robert testified that he and Kathleen expressed the desire to have the living areas be upstairs to "take benefit of the view." Robert also testified that he periodically visited the property to see how progress was being made because the home he and Kathleen were living in was not very far away, and that he met with Todd "mostly to pick out finishes and designs and colors and talking about all the finish work."

Even if that trial evidence had been produced in response to the motion for summary adjudication, it would not have created a triable issue of material fact whether the Owens defendants might be liable to plaintiffs for negligent construction.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.